Supreme Court, U.S.
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No. 96-1381

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

CONSTRUCTION INDUSTRY TRAINING COUNCIL OF WASHINGTON, a Washington non-profit corporation,

Petitioner,

vs.

SEATTLE BUILDING AND CONSTRUCTION TRADES COUNCIL; PAINTERS DISTRICT COUNCIL NO. 5; PUGET SOUND ELECTRICAL APPRENTICESHIP AND TRAINING TRUST; SEATTLE AREA PLUMBING AND PIPEFITTING INDUSTRY JOURNEYMAN AND APPRENTICE TRAINING COMMITTEE; SNO-KING SHEET METAL JOINT APPRENTICESHIP AND TRAINING COMMITTEE; WASHINGTON STATE APPRENTICESHIP AND TRAINING COUNCIL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Is a generally applicable state administrative procedure law, under which a state apprenticeship agency conducts an adjudicative hearing as part of its application process for registration of training programs, preempted by the Employee Retirement Income Security Act (ERISA) on the ground that it "relates to" an ERISA plan?

2. If so, is preemption forestalled by the ERISA "savings" clause, 29 U.S.C. § 1144(d), on the ground that preemption would impair or alter state apprenticeship standards recognized by the National Apprenticeship Act, 29 U.S.C. § 50?

3. Does the National Apprenticeship Act preempt a federally recognized state apprenticeship agency from conducting an adjudicative hearing as part of its process for registering a training program?

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RELEVANT STATUTES AND REGULATIONS

The following are reproduced in the Appendix:

- 29 C.F.R. § 29.12 (excerpts)
- Revised Code of Washington (RCW) 34.05 (excerpts)
- RCW 49.04.070

STATEMENT OF THE CASE

Respondent Washington State Apprenticeship and Training Council registers and oversees apprenticeship programs. Under state law, RCW 39.12.021, employers may pay less than the journeylevel prevailing wage to apprentices employed on public works who are indentured in a Council-registered apprenticeship program. This Court recently upheld a similar state law in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, No. 95-789 (February 18, 1997).

Under state law, registration of an apprenticeship program with the Washington State Apprenticeship and Training Council ("Apprenticeship Council") is voluntary. RCW 49.04.070. Petitioner CITC applied for registration for three craft programs: construction electrician, carpenter, and painter-decorator. Representatives of unions and joint labor-management apprenticeship committees affected by CITC's possible registration contested the application at an open

meeting of the Apprenticeship Council. Rather than refer the application to an adjudicative hearing, the Council took unsworn testimony at its meeting without opportunity for cross-examination, directed its staff to revise certain features of CITC's application outside of a meeting or hearing, and eventually registered the program.

Respondent Unions and joint apprenticeship committees sued to set aside the CITC registration. They claimed that the state administrative procedures act, which applies to virtually all state agencies, required the Apprenticeship Council to conduct a hearing before granting registration to CITC. Under the state APA, hearings on applications for "licenses" are required if an entity with standing to contest the license objects to its issuance. RCW 34.05.422(1)(b).

CITC filed no answer to the petition, later intervened, but raised no defense relating to preemption by federal law

(either ERISA or the National Apprenticeship Act). No facts were placed in the record regarding

> whether or when CITC was registered by the federal Bureau of Apprenticeship and Training (BAT) as an apprenticeship program under 29 C.F.R. § 29 or as a trainee program under 29 C.F.R. § 5.2(n)(2).
>
> whether CITC was a funded plan or otherwise was an "ERISA plan."
>
> the content of the Apprenticeship Council's submissions to BAT in connection with the Council's recognition as a BAT-recognized State Apprenticeship Council (SAC) under 29 C.F.R. § 29.12.

- BAT's consideration, if any, of the Apprenticeship Council's submissions.[1]

The trial court ruled that the Apprenticeship Council was not required to conduct an adjudicative hearing before registering CITC. The state Supreme Court, after accepting direct review, asked the parties sua sponte to comment on whether the ERISA preemption provision affected the case. The parties submitted position statements. CITC did not argue, either in the trial court or on appeal, that the National Apprenticeship Act preempted application of the state APA hearing requirement.

The state Supreme Court reversed the lower court's order. The Court held that the Unions and joint committees had standing under the state administrative procedures act to

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1 CITC represents as fact, or assumes without record support, that it is BAT registered under 29 C.F.R. § 29 as an apprenticeship program (Petition, 6), that it is an ERISA plan (Petition, 12), and that BAT had not authorized the Apprenticeship Council to conduct a hearing as part of its registration process (Petition, 3, 9, 18). As noted below, the lack of record evidence on these points bears on the issues which properly would be before the Court if certiorari were granted. Supreme Court Rule 15.2.

contest CITC's application,[2] that apprenticeship registration was a "license" within the meaning of the state APA, and that the Unions and joint committees were entitled under state law to contest CITC's application in an adjudicative hearing. The Court vacated the Apprenticeship Council's registration of CITC and remanded for a formal hearing.[3]

ARGUMENT

A. *Dillingham* Forecloses CITC's Argument That the State Supreme Court Failed To Consider Whether State Statutes Were Preempted By ERISA.

Under Washington law, apprenticeship registration is voluntary. RCW 49.04.070. However, as was the case in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, ___ U.S. ___ (No. 95-

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2 CITC's third question presented for review identifies a standing issue. However, CITC does not discuss standing in its petition and offers no reason for the Court to review the state court's resolution of the standing issue.

3 Contrary to CITC's representation (Petition, 4), the state Supreme Court did not rule that "all subsequent applications for approval of apprenticeship training programs" must be reviewed in a formal adjudicative hearing. The Court ruled only on the matter before it. The state APA requires a hearing only if an entity with standing contests an application at the proper time. RCW 34.05.422(1).

789) (February 18, 1997), Washington law provides incentives for registration. Contractors employing state-registered apprentices may pay apprentices less than the journeylevel prevailing rate of pay on state and local public works. RCW 39.12.021. State registration also provides some workers compensation benefits, and permits some apprentices to perform electrical utility work without a license. RCW 51.12.130(3); RCW 19.28.610.

CITC has not been foreclosed from applying for program registration. Instead, the case below focused on what procedures must be followed by the state registration agency, the Apprenticeship Council, before the application may be approved.

Under the Washington administrative procedures act, a "license" is an approval or registration "required by law." RCW 34.05.010(9)(a) (Appendix). Applications for licenses that are contested by persons with standing shall be conducted as adjudicative proceedings. RCW

34.05.422(1)(b) (Appendix). Because state approval is required before a program can enjoy the above three economic incentives conferred by law, the state Supreme Court ruled that for purposes of administrative law, Apprenticeship Council registration was a "license." As a result, a hearing was required before CITC's application could be approved.

CITC argues that the lower court should have considered the ERISA implications of the state laws conferring the above three economic incentives, before reaching the merits of the administrative law question. CITC claims that the three state laws, particularly RCW 39.12.021 relating to state prevailing wage payments to state-registered apprentices, are pre-empted by ERISA. The argument does not survive *Dillingham*.

Dillingham decided the question which CITC says was left undecided by the lower court: is a state prevailing wage law which provides an economic incentive to register an

apprenticeship program preempted by ERISA. *Dillingham* held that such laws are not preempted. Since the Washington and California laws are functionally identical, *Dillingham* is dispositive on the issue presented.[4]

CITC suggests that its purported BAT-registered status may matter (Petition, 9 n. 6). CITC's argument is not proper for review as the necessary facts supporting its argument are not in the record. Only ERISA "plans" trigger pre-emption, and there is no arguable conflict between the Council and BAT unless CITC was registered by BAT as an "apprenticeship" program under 29 C.F.R. § 29.[5] Neither point is established in the record. In any event, the *Dillingham* decision turned on the fact that state law does not dictate choices for an ERISA plan, not on any supposed conflict between BAT registration and state registration.

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4 It is irrelevant whether the other two state statutes are pre-empted by ERISA. RCW 39.12.021 is valid, and is sufficient support for the state court's ruling that Council registration is "required by law" for state APA purposes.

5 Programs also may be registered as "trainee" plans for Davis-Bacon Act purposes under 29 C.F.R. § 5.2(n)(2).

B. *Dillingham* Also Disposes Of CITC's Argument That ERISA Preempts A State's Procedures For Registering Apprenticeship Programs.

CITC next argues that, notwithstanding *Dillingham*, ERISA prohibits the Apprenticeship Council from requiring a hearing before registering apprenticeship programs. There are three reasons why review should not be granted.

First, *Dillingham* answers the argument. *Dillingham* held that state "prevailing wage laws and apprenticeship standards" do not "relate to" ERISA plans and therefore are not preempted. Slip op. at 17 (emphasis added). Mere procedural details of an application review process do not bind an ERISA plan to anything and do not dictate choices. Since a state properly may apply its own registration standards, it certainly may determine how it will go about evaluating an application.

Second, the record is inadequate to permit review of this issue. Only ERISA plans can invoke ERISA preemption. 29 U.S.C. § 1144(a). CITC represents that it is an ERISA

plan, merely because it is a training program (Petition, 12). However, CITC's status as an ERISA plan was not litigated below and no relevant findings were made. As *Dillingham* made clear, there may be apprenticeship programs which, because of their funding method, are not ERISA plans. Slip op., 8-11. Since the factual predicate for CITC's ERISA argument is lacking, the issue cannot be reviewed.

Third, CITC bases its argument on a statement of the effect of state law which is plainly wrong. CITC claims that the hearing requirement "specifically refers to apprenticeship training programs" and is "specifically directed" at them (Petition, 16). To the contrary, the hearing requirement is imposed by an administrative procedures act which applies to applicants for licenses of whatever sort before virtually all state agencies.

Mackey v. Lanier Collections Agency & Service, 486 U.S. 825 (1988), cited by CITC, actually supports the state court's decision. *Mackey* held that a general state

garnishment law, which applied to an ERISA plan, is not preempted by ERISA. 486 U.S. at 831-838. This was so even though, as CITC argues also, the general law imposed "substantial administrative burdens and costs" on ERISA plans. 486 U.S. at 831. Likewise, state APA requirements apply to all applicants for licenses, including CITC. Incidental burdens incurred in the application process have no ERISA significance.

C. CITC Did Not Place In The Record The Facts Necessary To Support Its Argument That the National Apprenticeship Act Preempts The State Hearing Requirement. Moreover, No Substantial Federal Question Is Raised And CITC Has Waived The Issue.

CITC argues for the first time that the National Apprenticeship Act (Fitzgerald Act) preempts the Apprenticeship Council from complying with state administrative procedure law when evaluating CITC's application. There are several reasons why this issue is not appropriate for review.

First, the argument is founded on non-record assertions. CITC represents that the federal BAT has not approved or has declined permission for the Apprenticeship Council to use a hearing as part of its application process (Petition, 18, 21). However, the Council's `SAC application' and the BAT's review of it are not in the record. Without such basic information, the Court cannot evaluate whether a conflict between state and federal registration procedures exists.

In addition, CITC claims without record support that it is a BAT apprenticeship program.[6] This on its face is questionable, because BAT delegates its registration function to recognized state agencies such as the Apprenticeship Council. 29 C.F.R. § 29.12(a); (e)(2). CITC may well be a federally approved trainee program for Davis-Bacon Act

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6 CITC made no such factual showing below and there was no finding to that effect. Opponents of CITC's application stated in the agency record their understanding that BAT regulated CITC, but such anecdotal secondhand evidence does not establish what type of program CITC is.

purposes, but that is different from being a federally-registered apprenticeship program under 29 C.F.R. § 29.3. See: 29 C.F.R. §§ 5.2(n)(1) and (2); 5.5(a)(4)(i) and (ii).

Second, CITC grounds its argument on administrative frustration (Petition, 20) but fails to point out that BAT is not bound by state law when it registers programs for federal purposes in non-SAC states. It follows its own procedures. If it also assumes authority to register for state purposes in such states -- an assertion unsupported by the record or the BAT regulations -- its obligation to follow disparate state standards hardly raises an important federal issue.

Third, CITC waived the issue by failing to raise it below. Pre-emption arguments affecting the choice of law are waivable and cannot be raised for the first time on appeal. *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1497 (9th Cir. 1986); *see also: Wolf v. Reliance Std. Life Ins. Co.*, 71 F.3d 444, 448-49 (1st Cir. 1995) *and In re Heci*

Exploration Co., Inc., 862 F.2d 513, 520 (5th Cir. 1988) (both citing *Gilchrist* with approval).

Finally, the issue lacks substantial merit. Congress intended for the Secretary of Labor to cooperate with, not override, state apprenticeship agencies. 29 U.S.C. § 50 (directing Secretary to "cooperate" with state agencies to formulate apprenticeship standards). The Secretary of Labor expressly disclaimed any intent to pre-empt state practices. 42 Fed. Reg. 10138, 10139 ¶ 8 (February 18; 1977). State agencies may adopt "policies and operating procedures which depart from or impose requirements in addition to" federal standards. 29 C.F.R. § 29.12(a)(5) (emphasis added). The federal regulations are silent on the procedures state agencies may follow when processing applications for registration.

Hence, pre-emption of state application procedures by the National Apprenticeship Act is not fairly arguable. *See: Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 716-17 (1985) (comprehensiveness of federal

regulations typically does not imply intent to pre-empt); *Freightliner v. Myrick*, ___ U.S. ___, 131 L. Ed 2d 385, 392, 115 S.Ct. 1483, 1488 (1995) (no conflict pre-emption where there is no federal standard to comply with).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted this 28th day of March, 1997.

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APPENDIX

29 C.F.R § 29.12 (Excerpts)

(a) The Secretary's recognition of a State Apprenticeship Agency or Council (SAC) gives the SAC the authority to determine whether an apprenticeship program conforms with the Secretary's published standards and the program is, therefore, eligible for those Federal purposes which require such a determination by the Secretary. Such recognition of a SAC shall be accorded by the Secretary upon submission and approval of the following:

. . .

(5) A description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part.

. . .

(e) State apprenticeship programs.

. . .

(2) In the event that a State Apprenticeship Agency is not recognized by the Bureau for Federal purposes, or that such recognition has been withdrawn, or if no State Apprenticeship Agency exists, registration with the Bureau may be requested. Such registration shall be granted if the program is conducted, administered, and operated in accordance with the requirements of this part and the equal opportunity regulation in 29 CFR part 30, as amended.

Revised Code of Washington (RCW) 34.05 (Excerpts)

RCW 34.05.010(9)

> (a) "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law, but does not include (i) a license required solely for revenue purposes, or (ii) a certification of an exclusive bargaining representative, or similar status, under a collective bargaining law or similar statute, or (iii) a license, franchise, or permission for use of trademarks, symbols, and similar property owned or controlled by the agency.

RCW 34.05.422(1)

Unless otherwise provided by law: (a) Applications for rate changes and uncontested applications for licenses may, in the agency's discretion, be conducted as adjudicative proceedings; (b) applications for licenses that are contested by a person having standing to contest under the law and review of denials of applications for licenses or rate changes shall be conducted as adjudicative proceedings; and (c) an agency may not revoke, suspend, or modify a license unless the agency gives notice of an opportunity for an appropriate adjudicative proceeding in accordance with this chapter or other statute.

RCW 49.04.070

The provisions of this chapter [Apprenticeship] shall apply to a person, firm, corporation, or craft only after such person, firm, corporation, or craft has voluntarily elected to conform with its provisions.